

TITLE 14, NATURAL RESOURCES

NOTICE OF PROPOSED RULEMAKING

BOARD ADMINISTRATION FEE

NOTICE IS HEREBY GIVEN that the State Mining and Geology Board (SMGB) proposes to adopt the regulation described below after considering all comments and recommendations regarding the proposed action.

REGULATORY ACTION

The SMGB proposes to add § 3696.5 to the California Code of Regulations (CCR), Title 14, Division 2, Chapter 8, Subchapter 1. The regulation clarifies and makes specific the administration fee imposed upon each mining operation to cover the reasonable costs incurred by the SMGB when acting as lead agency in implementing the Surface Mining and Reclamation Act (SMARA, Public Resources Code § 2710 et seq.) and Chapter 2 of the Public Resources Code (PRC) as provided for in statute (PRC § 2207[e]).

PUBLIC HEARINGS AND WRITTEN COMMENTS

The SMGB has not scheduled a public hearing on this proposed action; however, the SMGB will hold a hearing to receive comments if it receives a written request for a public hearing from any interested person, or his/her authorized representative, no later than 15 days before the close of the written comment period. The hearing facility will be barrier free in accordance with the Americans with Disabilities Act. At the hearing, any person may present statements or arguments orally or in writing relevant to the proposed action described in the Informative Digest. The SMGB requests, but does not require, that persons who make oral comments at the hearing also submit a written copy of their testimony.

Any interested person may submit written comments relevant to the proposed regulatory action to the SMGB. The Written Comment Period closes at 4:00 P.M., September 7, 2004. The SMGB will consider only relevant comments received at the SMGB office by that time. Late submittals will not be considered.

AUTHORITY AND REFERENCE

The SMGB proposes to adopt a regulation that adds §3696.5 to Article 8 of the California Code of Regulations, Title 14, Division 2, Chapter 8, Subchapter 1, pursuant to its authority granted in PRC §2207(e) and PRC §2755. Reference: PRC §2207(e) and PRC §2755.

INFORMATIVE DIGEST

The Surface Mining and Reclamation Act of 1975 (SMARA, Public Resources Code § 2710 et seq.) was enacted to ensure that significant adverse impacts of mining to the environment are prevented or mitigated and public health and safety are protected. Under SMARA, surface mining operators are required to submit to their respective lead agencies (cities and counties) for approval, a plan for reclaiming mined lands as well as proof of financial assurances to ensure those mined lands are reclaimed in accordance with the approved reclamation plan. Lead agencies are responsible for ensuring their surface mining operators are in compliance with SMARA's permit and reclamation requirements. The Department of Conservation (Department) and the State Mining and Geology Board (SMGB) provide SMARA lead agency assistance and oversight.

SMARA is a State law that is designed to be implemented primarily by local lead agencies. A lead agency is defined in PRC §2200.5 (Chapter 2) and PRC §2728 (Chapter 9) as a city, county, the State Mining and Geology Board (SMGB), and the San Francisco Bay Conservation and Development Commission. To prevent SMARA, and Chapter 2 of the Public Resources Code, from being unfunded State mandated programs, a lead agency is provided authority to impose a fee upon each mining operation within its jurisdiction to cover the reasonable costs incurred in implementing Chapter 2, commencing with PRC §2200, and Chapter 9 (SMARA), commencing with PRC §2710.

Throughout the State, lead agencies have established in their local ordinances schedules of specific fees to cover the cost of performing a lead agency service that is related to the running of the lead agency's SMARA program. These service related fees are imposed on each surface mining operation. The nature of a fee varies from a flat fee per specific service, or an hourly-rate fee to perform a service, to a combination of flat fee plus hourly-rate fee. There are 84 cities and 57 counties that are SMARA lead agencies (141 SMARA lead agencies in the State). Not all agencies have fees for the same services.

SMARA provides for, in some instances, the SMGB to assume the role of lead agency for the administration of the Act when a local lead agency is not able to perform that role (ref. PRC §2774.4, §2774.5). PRC §2207(e) specifically provides for the SMGB to impose a fee upon each mining operation to cover its reasonable costs in implementing Chapter 2 and Chapter 9 of the Public Resources Code when the SMGB is acting in the capacity of SMARA lead agency. Since 1998, the SMGB has assumed the role of SMARA lead agency 49 times. Currently, the SMGB is the SMARA lead agency for two counties and 16 cities, encompassing 37 mines.

Since 1998, the SMGB has not found it necessary to impose an administration fee on those mines within the SMGB's SMARA lead agency jurisdictions to cover the costs of administering the Act. Funds adequate to cover the SMGB's operating costs were

derived solely from the Surface Mining and Reclamation Account (SMRA) in the General Fund. This Account received its money from Federal royalty payments to the State under the Mineral Lands Leasing Act. Money from this Account, also, was used to pay for the Department of Conservation's SMARA mineral programs managed by the California Geological Survey (Division of Mines and Geology) and the Office of Mine Reclamation.

The SMGB is authorized, also, to receive operating funds from the Mine Reclamation Account (MRA), which derives its moneys from the annual reporting fees collected by the Department of Conservation (DOC) each year, as well as moneys collected by the DOC or the SMGB for SMARA related actions such as the imposition of penalties on mine operators, service fees, or interest on accounts (PRC §2207(d)(4)(A)). The SMGB has never accepted funding from the MRA account to avoid the appearance of a conflict of interest, since the SMGB establishes the annual reporting fee schedule as well as assesses penalties on mine operators for violations of SMARA.

Recently, funding to the DOC and the SMGB from the Surface Mining and Reclamation Account has been curtailed by approximately 45 percent, principally because of the effects of statutory triggers that resulted from the sale of Federal petroleum producing properties to private companies, thereby reducing royalty money going into the SMRA. No substitute funding source has been approved.

Since January 1, 1991, the SMGB has had statutory authority to assume the SMARA powers of a local lead agency; however, until 1998 the SMGB had not done so. About that time, the SMGB commenced actively enforcing SMARA's requirement that local lead agencies possess SMARA-compliant mining ordinances. Unless a city or county had a SMGB-certified mining ordinance in accordance with current SMARA, that city or county could not serve as an administrator of SMARA. Beginning in 1998, the SMGB's activities became more focused on the performances of lead agencies in their administration of the Act.

Since 1998, the SMGB has considered actions on 903 staff reports brought before it (approximately 129 reports per year) of which 323 reports were related directly to the SMGB acting in the capacity as a SMARA lead agency (approximately 36 percent of reports). However, in the years 2002, 2003, and to date in 2004, about 60 percent of the SMGB's actions on staff reports directly were related to its SMARA lead agency responsibilities (390 staff reports overall; 232 reports dealing with SMGB SMARA oversight).

The SMGB's role as a SMARA lead agency, also, has resulted in substantial increases in overhead costs for record-keeping and file maintenance. At present, approximately 36 percent of the SMGB's active filing system is devoted to lead agencies and mines within those agencies over which the SMGB has SMARA jurisdiction. With time, these file records will continue to grow and consume additional space and maintenance, even

if no additional lead agency assumptions are enacted by the SMGB. There has, likewise, been a significant increase in staff time required to maintain and process the necessary billing, accounting, document retrieval, reproduction and storage, correspondence, mailing, etc., associated with lead agency activities. In the last several years, virtually all of the SMGB's involvement in lawsuits directly has been related to its actions as a SMARA lead agency. This has resulted in additional legal expenses for the SMGB to prosecute these cases.

With reductions in its base funding from the SMRA, the SMGB is no longer able to absorb all of the overhead costs for its activities as a SMARA lead agency, and must turn to funding from another authorized source. This source is provided in PRC §2207(e).

City and County SMARA lead agencies charge a variety of fees to fund the cost of implementing Chapter 2 and Chapter 9 (SMARA). In mid-January, 2004, the SMGB commenced a statewide survey of SMARA lead agencies to ascertain the types and amounts of fees charged to surface mine operators by these lead agencies for the administration of their SMARA programs. Although the response was not large, it appears to represent a valid spectrum of SMARA lead agencies (responding: 6 cities [7%] and 27 counties [47%]).

Almost all lead agencies charge a combination fee for a particular service; that is: (1) a basic flat fee that covers minimum time for a service, and then a cost per hour rate for time in excess of the basic flat fee; or (2) the actual cost to produce a report or permit charged by a consultant, plus an hourly rate to cover the lead agency's staff time to process the report or permit. Lead agency hourly staff rates averaged \$76 (ranged from \$30 to \$112 per hour).

PRC§2207(e) provides for the SMGB to impose "a fee" on a surface mine operator under the SMGB's SMARA jurisdiction. The SMGB interprets this to mean a single fee, rather than a schedule of fees that range over a variety of services. There are two main types of single fees that may be considered: (1) a flat fee per mine per year, and, (2) an hourly-rate fee for staff time and materials devoted to each mine.

For simplicity of calculation and budgeting for both mine operations and the SMGB, the SMGB recommends that a flat fee be imposed. The flat fee method recommended is a service fee per day in which a mine is under SMGB jurisdiction. The basis for the flat fee is the total hourly resource cost required to operate the SMGB of \$184, times the average hours spent on each mine per year (25.68 hours). This flat fee would calculate to be approximately \$4,725, or \$12.95 per day. However, the SMGB expects that approximately one half of this hourly cost, as it pertains solely to the SMGB's lead agency activities, will be offset by additional funds reallocated from portions of the SMRA funds previously used by the California Geological Survey and from the Office of Mine Reclamation. Therefore, the cost imposed to mine operations would be \$92 per

hour times 25.68 hours or \$2,363 per year, or approximately \$6.50 per day. The SMGB recommends that this flat fee be set at \$7.00 per day (rounded to nearest dollar) per mine for each day the mine is subject to the SMGB's SMARA jurisdiction.

POLICY STATEMENT OVERVIEW

The proposed language in the regulation clarifies and makes specific the administration fees to be imposed upon each mining operation to cover the reasonable costs incurred by the SMGB when acting as lead agency in implementing the Surface Mining and Reclamation Act (SMARA, Public Resources Code § 2710 et seq.) and Chapter 2 of the Public Resources Code (PRC) as provided for in statute (PRC § 2207[e]). This regulation is necessary in order to protect the California public and environment by providing funds to the SMGB to operate its programs mandated by SMARA when the SMGB is the operating lead agency. Specifically, this regulation addresses PRC § 2207(e).

CEQA COMPLIANCE

The SMGB staff have determined that this rule making project is either not a project under Title 14, CCR § 15378 of the CEQA Guidelines, or is Categorically Exempt under Title 14, CCR § 15308 of the CEQA Guidelines.

DISCLOSURES REGARDING THE PROPOSED ACTION

The SMGB staff has made the following preliminary determinations:

Mandate on local agencies and school districts: The SMGB staff determined that adoption of this regulation does not impose any new mandates on local agencies or on local school districts.

Costs or savings to any State agency: The SMGB staff determined that this proposed regulation imposes no savings or additional expenses to state agencies.

Cost to any local agency or school district which must be reimbursed in accordance with Government Code §§ 17500 through 17630: The SMGB staff determined this proposed regulation does not impose any additional cost obligations on local agencies or on local school districts.

Other non-discretionary costs or savings imposed upon local agencies: The SMGB staff determined that no other non-discretionary costs or savings to local agencies are imposed by the proposed regulations.

Cost or savings in Federal funding to the State: The SMGB staff determined that there are no costs or savings in Federal funding to the State.

Significant statewide adverse economic impact directly affecting business including the ability of California businesses to compete with businesses in other states: SMGB staff determined that no statewide adverse impacts to California businesses result from the adoption of this proposed regulatory language.

Potential cost impact on private persons or directly affected businesses: The SMGB staff has determined that the imposition of the proposed administration fee on a directly affected local mining operation may have a small cost impact to that operation; however, the cost impact may be wholly or partially offset by a reduction of local SMARA program fees charged to the mine by the local lead agency since the local lead agency no longer is implementing its SMARA program.

Creation or elimination of jobs in California: The SMGB staff has determined that the adoption of these regulations will not:

- ?? Create nor eliminate jobs within California;
- ?? Create new nor eliminate existing businesses within California;
- ?? Expand businesses currently doing business in California.

Significant effect on housing costs: The SMGB staff has determined that the adoption of these regulations will have no significant effect on housing costs.

Effects on small businesses: The SMGB staff has determined that the imposition of the proposed administration fee on a local mining operation (which may meet the criteria for a “small business”) may have a small cost impact to that operation; however, the cost impact may be wholly or partially offset by a reduction of local SMARA program fees charged to the mine by the local lead agency since the local lead agency no longer is implementing its SMARA program. That is, some or all of the SMARA administration fee formerly paid to the local lead agency would now be paid to the SMGB to run the local program until the local agency comes into compliance with SMARA.

CONSIDERATION OF ALTERNATIVES

The SMGB must determine that no reasonable alternative that it considers or that has otherwise been identified and brought to the attention of the SMGB would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

SMGB staff has not identified any adverse impacts resulting from the proposed regulation.

No alternatives have been considered by the SMGB at this time that would be more effective in carrying out the purpose for which the regulatory action is proposed, nor have any other alternatives been proposed that would be as effective and less burdensome to affected private persons, lead agencies, or small businesses.

AVAILABILITY OF STATEMENT OF REASONS AND TEXT OF REGULATIONS

An interested person may request a copy of the proposed regulation and the Initial Statement of Reasons, or direct questions about the proposed regulation and Initial Statement of Reasons and inspect all supplemental information, upon which the regulation is based, contained in the rulemaking file. The rulemaking file is available for inspection at the SMGB Office at 801 K Street, Suite 2015, Sacramento, California, between 9:00 A.M. and 4:00 P.M., Monday through Friday except during state holidays. Copies of the proposed regulation and the Initial Statement of Reasons may be requested by writing to the above address, or viewed on the SMGB's Internet Web Site at: <http://www.conservation.ca.gov/smgb>

AVAILABILITY OF CHANGED OR MODIFIED TEXT

Following the public comment period, the SMGB may adopt, as final, the proposed regulation substantially as described in this Notice and Informative Digest. Copies of the regulation, as finally adopted, will be sent to all persons on the SMGB's public comment mailing list for this issue and others requesting copies. If, as a result of public comment, substantive changes to the regulation are deemed appropriate, copies of the proposed changes will be sent to all persons who testified at the public hearing or submitted written comments during the comment period or at the public hearing, and to those who have requested copies of information regarding the regulation. The modified text will be available to the public for at least 15 days before the SMGB adopts the regulation as revised. The SMGB will accept written comments for a period of at least 15 days after the date upon which changes were made available. If adopted, the regulation will appear in CCR, Title 14, Division 2, Chapter 8, Subchapter 1, Article 8, §3696.5. A copy of the Final Statement of Reasons may be obtained by contacting the SMGB office as described under the section Contact Person.

CONFLICT WITH FEDERAL REGULATIONS

This regulation does not duplicate or conflict with existing Federal statutes or regulations. Also, by Memorandum of Understanding with the Federal Bureau of Land

Management, the U. S. Forest Service, the Department of Conservation, and the State Mining and Geology Board, SMARA and federal law are coordinated to eliminate duplication.

CONTACT PERSON

Inquiries concerning the substance of the adopted regulation should be directed to:

Ms. Kit Gonzales, Executive Assistant
(or as a backup)
John G. Parrish, Ph. D., Executive Officer
State Mining and Geology Board
801 K Street, Suite 2015
Sacramento, California 95814

INITIAL STATEMENT OF REASONS

GENERAL PURPOSE AND CONDITION ADDRESSED

The SMGB proposes to add § 3696.5 to the California Code of Regulations (CCR), Title 14, Division 2, Chapter 8, Subchapter 1. The regulation clarifies and makes specific the administration fee imposed upon each mining operation to cover the reasonable costs incurred by the SMGB when acting as lead agency in implementing the Surface Mining and Reclamation Act (SMARA, Public Resources Code § 2710 et seq.) and Chapter 2 of the Public Resources Code (PRC) as provided for in statute (PRC § 2207[e]).

SPECIFIC PURPOSE

The proposed added regulatory language is intended to clarify and make specific the method and amount of an administrative fee to be imposed by the SMGB on a surface mine operation when the SMGB is the SMARA lead agency for that mine operation.

§ 3696.5 – Board Administration Fee

SMARA provides for, in some instances, the SMGB to assume the role of lead agency for the administration of the Act when a local lead agency is not able to perform that role (PRC §2774.4, §2774.5). PRC §2207(e) specifically provides for the SMGB to impose a fee upon each mining operation to cover its reasonable costs in implementing Chapter 2 and Chapter 9 of the Public Resources Code when the SMGB is acting in the capacity of SMARA lead agency. Since 1998, the SMGB has assumed the role of SMARA lead agency 49 times. Currently, the SMGB is the SMARA lead agency for two counties and 16 cities, encompassing 37 mines.

§3696.5 – This new section is necessary to describe the mine operations subject to the administration fee, the method, and the amount of the administration fee to be imposed. The section: (1) defines the mine operations that are subject to SMARA, and then limits the defined mine operations that are subject to the administration fee to those that directly are under the SMGB's jurisdiction as lead agency; (2) describes when each mine subject to the administration fee will be assessed the fee, and when the payment of the fee is due; and, (3) sets the flat rate fee at \$7 per day for each day that the mine operation is subject to SMGB administration. The information in this section is required to limit the SMGB's administration fee to specific mine operations that directly receive the benefit of the SMGB's administration activities, and establish an assessment date, payment due date, and clarify how the fee is calculated.

STATEMENT OF NECESSITY

Public Resources Code §2207(e) provides for the SMGB to impose, when acting as a lead agency, a fee upon each mining operation to cover the reasonable costs incurred in implementing Chapter 2 and Chapter 9 (commencing with Section 2710) of the Public Resources Code. Without the imposition of the proposed administration fee, there would be no funds to operate the SMGB's SMARA programs within the lead agencies for which SMARA has mandated that the SMGB assume responsibilities.

IDENTIFICATION OF TECHNICAL / THEORETICAL / EMPIRICAL STUDY, REPORTS, OR DOCUMENTS UPON WHICH THE SMGB HAS RELIED

In order to determine the range, diversity, and purpose of administration fees charged by lead agencies (Cities and Counties) for their SMARA programs pursuant to PRC §2207(e), the SMGB conducted a statewide survey of these local agencies between January and March, 2004. These survey data were reviewed by the SMGB and have been publicly available since mid-April, 2004. The data were publicly discussed at the SMGB's June 10, 2004, regular business meeting. The results of the survey were distributed to all participating lead agencies for their information.

PROPOSED REGULATION TEXT (underlined)

§3696.5 – Board Administration Fee

Each surface mining operation, as defined in Public Resources Code sections 2719, 2727.1, and 2735, and, Title 14 California Code of Regulations, Section 3501, unless exempted by Public Resources Code Section 2714, shall be assessed each January 31 an annual administration fee of \$7 (seven dollars) per day for each day of the previous calendar year that the surface mine operation was under the board's jurisdiction as lead agency pursuant to Chapter 9, commencing with Section 2710. The administration fee is due and payable to the State Mining and Geology Board not later than April 1 each year by the surface mine's owner or operator of record on the preceding December 31. Note: Authority: Sections 2207, 2755, Public Resources Code. Reference: Section 2207, Public Resources Code.